FARIDAH BEGUM BTE ABDULLAH

v.

DATO' MICHAEL CHONG

HIGH COURT MALAYA, KUANTAN
DATO' ARIFIN BIN ZAKARIA J
[CIVIL SUIT NO. 22-30 OF 1994]
17 MARCH 1995

PRACTICE & PROCEDURE*: O. 23 r. 1(1) RHC - Application by defendant for security for costs - Principles applicable - Plaintiff, a foreigner, adjudged bankrupt - Preliminary objection by plaintiff - Whether an order for security for costs can be made against a bankrupt - Whether plaintiff's impecuniosity a sufficient ground for granting the application - Proximity of countries - Whether ease of enforcement and merits of case to be considered.*

This was an application for security for costs by the defendant on the grounds that:

(i) the plaintiff is ordinarily resident out of the jurisdiction;

(ii) the plaintiff failed to state her permanent address in Malaysia or in Singapore;

(ii) the defendant has a strong *prima facie* defence to the plaintiff's claim;

(iv) the plaintiff has no sufficient assets within the jurisdiction;

(v) the plaintiff has no genuine case; and

(vi) the plaintiff is a bankrupt.

The plaintiff is a Singaporean citizen with a piece of property as her only asset which the plaintiff had apparently sold for the sum of RM300,000. The plaintiff also claimed to be a director of two local companies but according to the defendant the two companies had no substantial assets and were both inactive. Furthermore the plaintiff had been adjudged bankrupt by the High Court, Kuantan. These facts were undisputed by the plaintiff but Counsel for the plaintiff contended that in view of the fact that Singapore was listed in the First Schedule of the Reciprocal Enforcement of Judgments Act 1958 coupled with the close proximity of the countries, the enforcement of judgment would be relatively easy.

At the outset of the hearing, Counsel for the plaintiff raised a preliminary objection that since the plaintiff had been adjudged bankrupt, an order for security for costs would amount to a debt provable under s. 8(1) of the Bankruptcy Act 1967 and the Official Assignee would be an aggrieved party. Accordingly, the present application would fall foul of the Rules of the High Court since the Official Assignee had not been joined as a party. Counsel for the defendant countered that s. 8(1) related to a debt provable in bankruptcy whereas, security for costs in a pending suit is not a debt provable. He maintained that a mere act of bankruptcy or impecuniosity was not a ground for security for costs being ordered against a party and therefore, by implication, security for costs could still be ordered in a fit and proper case.

Held:

[1] The authorities merely indicate that bankruptcy or impecuniosity should not by itself be a ground for ordering security for costs, they do not say that in those circumstances an order for security for costs could not be made. Since there is nothing either in the Bankruptcy Act or in the Rules of the High Court which takes away the discretion of the Court under O. 23 to order security for costs in a fit and proper case, O. 23 applies to a bankrupt in the

same way as it applies to other litigants. The plaintiff's preliminary objection is therefore dismissed.

[2] The defendant's apprehension over the plaintiff's ability to meet any order as to costs that may be made by the Court is not without basis. However, the plaintiff's impecuniosity by itself is not a sufficient ground for the Court to make the order for security for costs.

[3] Ease of enforcement is a factor which should properly be taken into consideration but the mere fact that a plaintiff is resident in Singapore is not a ground for the Court refusing to order security for costs. Up until the date of hearing of this application, the plaintiff has not disclosed her Singapore address nor has she offered any explanation for not doing so which should weigh against the plaintiff.

[4] The Court should only embark into the investigation upon the merits in plain and obvious cases and not in cases where the issues involved are complex. On the face of the pleadings and affidavits, the final outcome of this case is far from clear. Therefore, the question of merits is not really crucial to the ultimate outcome of this application.

[Application allowed. Plaintiff to pay into Court RM15,000 towards security for costs before the next hearing date. Costs in the cause].

Cases referred to:
Rhodes v. Dawson [1886] 16 QBD 548 ***(refd)***
Cook v. Whellock [1980] 24 QBD 658 ***(refd)***
Kasturi Palm Products v. Palmex Industries Sdn. Bhd. [1986] 2 MLJ 310 ***(refd)***
Sir Lindsay Parkinson Ltd. v. Triplan Ltd [1973] 1 All ER 273 ***(refd)***
Thune & Anor. v. London Properties Ltd. & Ors. [1990] 1 All ER 972 ***(foll)***
Coldham v. The Raub Australian Gold Mining Co. Ltd. [1940] 9 MLJ (FMSR) 50 ***(refd)***
Ng Hui Lip & Anor. v. Chan Hwa Cheng & Ors. [1958] 24 MLJ 57 ***(foll)***
Porzelack KG v. Porzelack (UK) Ltd. [1987] 1 All ER 1074 ***(foll)***
Amar Hoseen Mohammed Revai v. Singapore Airlines Ltd. [1995] 1 SLR 77 ***(refd)***

Legislation referred to:
Civil Procedure Code, s. 369
Bankruptcy Act, s. 8(1)
Rules of the High Court, O. 23 r. 1(1)
Reciprocal Enforcement of Judgments Act 1958.

Other sources referred to:
Supreme Court Practice 1993 Vol. I, para. 23/1 - 3/2

For the plaintiff - Karpal Singh; M/s. Karpal Singh & Co.
For the defendant - Bastion Vendargon; M/s. Vendargon & Partners

JUDGMENT

Arifin bin Zakaria J:

This is an application by the defendant under O. 23 of the Rules of the High Court 1980 for security for costs to be furnished by the plaintiff. The defendant filed a total of 4 affidavits in support of his application. (Encl. 6A, 18A, 26A and 29A). The plaintiff filed 3 affidavits in reply. (Encls. 15A, 21A and 27A). The plaintiff is a citizen of the Republic of Singapore, and having no permanent resident status in Malaysia. The plaintiff has been a regular visitor to

Malaysia since 1990. During the pendency of this application the plaintiff had been adjudged bankrupt pursuant to bankruptcy petition no. 29-69-1994 in the High Court of Malaya at Kuantan.

Preliminary objection

When this matter came up for hearing on 14 January 1995 Mr. Jagdeep Singh, Counsel for the plaintiff, raised a preliminary objection with regard to this application. He stated that, since the plaintiff had been adjudged bankrupt this may give rise to problem of compliance because of s. 8(1) of the Bankruptcy Act 1967. He contended that an order for security for costs would amount to a debt provable under s. 8(1) of the Bankruptcy Act thus, the Official Assignee would be an aggrieved party. This application would fall foul of the Rules of the High Court since one of the aggrieved party, i.e., the Official Assignee, had not been joined as a party. In reply Mr. Vendargon on behalf of the defendant countered that s. 8(1) of Bankruptcy Act relates to a debt provable in bankruptcy whereas, security for costs in a pending suit is not a debt provable, it is not such, at least, not until at the end of the day.

He further maintained that on the authorities of *Rhodes v. Dawson* [1886] 16 QBD 548 and *Cook v. Whellock* [1980] 24 QBD 658, mere act of bankruptcy or impecuniosity is not a ground for security for costs to be ordered against a party and therefore, he said, by necessary implication security for costs may still be ordered in a fit and proper case. He also contended that, to say that an order for security for costs could not be made against a bankrupt would in effect put a bankrupt in a more privileged position than a non bankrupt. That he said, could not be right.

For reasons that will follow, I agree entirely with the submissions of the learned Counsel for the defendant. The authorities merely indicate that bankruptcy or impecuniosity should not by itself be a ground for ordering security for costs, they do not say that in those circumstances an order for security for costs could not be made. Since there is nothing either in the Bankruptcy Act or in the Rules of the High Court which takes away the discretion of the Court under O. 23 to order security for costs in a fit and proper case, I take it that, O. 23 applies to a bankrupt in the same way as it applies to other litigants. But as established by several authorities bankruptcy should not be a factor that should prompt the Court in making such an order. For those reasons I hold that the Court is not precluded by reason of the plaintiff's bankruptcy, from ordering the plaintiff to furnish security for costs, if in all the circumstances of the case, the Court finds it just so to do. I, therefore, dismissed the plaintiff's preliminary objection.

The Application Proper

Security for costs is governed by O. 23 r. 1(1) of the Rules of the High Court which provides as follows:

> rule 1(1) Where, on the application of a defendant of an action or other proceeding in the High Court, it appears to the Court:
>
> (a) that the plaintiff is ordinarily resident out of the jurisdiction; or
>
> (b) ...
>
> (c) subject to para. (2), that the plaintiff's address is not stated in the writ or other originating process or is incorrectly stated therein; or

(d) ...

then, if, having regard to all the circumstances of the case, the Court thinks it just to do so, it may order the plaintiff to give such security for the defendant's costs of the action or other proceeding as it thinks just.

(2) The Court shall not require a plaintiff to give security by reason only of para. 1(c) if he satisfies the Court that the failure to state his address or the mis-statement thereof was made innocently and without intention to deceive.

The legal position with regard to security for costs is clearly stated in para. 23/1 - 3/2 of the *Supreme Court Practice* 1993 Vol. I which reads:

> ...Rule 1(1) provides that the Court may order security for costs "if, having regard to all the circumstances of the case, the Court thinks it just to do so". These words have the effect of conferring upon the Court a real discretion, and indeed the Court is bound, by virtue thereof, to consider the circumstances of each case, and in the light thereof to determine whether and to what extent or for what amount a plaintiff (or the defendant as the case may be) may be ordered to provide security for costs. It is no longer for example, an inflexible or rigid rule that a plaintiff resident abroad should provide security for costs.

And a little down the same page it says:

> Security cannot now be ordered as of course from a foreign plaintiff, but only if the Court thinks it just to order such security in the circumstances of the case.

This statement of the law was approved and adopted by Mohamad Dzaiddin J (as he then was) in *Kasturi Palm Products v. Palmex Industries Sdn. Bhd.* [1986] 2 MLJ 310. Some indication of the relevant circumstances to be considered may be drawn from what was said by Lord Denning MR in *Sir Lindsay Parkinson Ltd. v. Triplan Ltd.* [1973] 2 All ER 273 at p. 285 where he said:

> The Court has a discretion which it will exercise considering all the circumstances of the particular case. So I turn to consider the circumstances. Counsel for Triplan helpfully suggests some of the matter which the Court might take into account, such as whether the company's claim is *bona fide* and not a sham and whether the company has a reasonably good prospect of success. Again it will consider whether there is an admission by the defendants on the pleadings or elsewhere that money is due. If there was a payment into Court of a substantial sum of money (not merely a payment into Court to get rid of a nuisance claim), that too would count. The Court might also consider whether the application for security was being used oppressively - so as to try to stifle a genuine claim. It would also consider whether the company's want of means has been brought about by any conduct of the defendants, such as delay in payment or delay in doing their part of the work.

The defendant is relying on 6 main grounds in support of his application, namely:

(a) the plaintiff is ordinarily resident out of the jurisdiction;

(b) the plaintiff failed to state her permanent address in Malaysia or in Singapore;

(c) defendant has a strong *prima facie* defence to the plaintiff's claim;

(d) the plaintiff has no sufficient assets within the jurisdiction;

(e) the plaintiff has no genuine case; and

(f) the plaintiff is a bankrupt.

It is not in dispute that the plaintiff is a resident of Singapore and her only asset within the jurisdiction is a piece of property known as Lot No. 1384 Kampung Baru Beserah. This property was at the date of hearing of this application subjected to the following encumbrances:

(a) Lien Holder's Caveat dated 19 August 1993 lodged by Balakrishnan a/1 V. Sinnayah;

(b) Kaveat persendirian lodged by Gan Kuan Leng, Elvin (Yan Guan Long, Elvin) registered on 22 March 1994; and

(c) Perintah Larangan issued by the Session's Court Kuantan dated 4 August 1994.

Further, according to a "surat akuan" allegedly executed by the plaintiff dated 11 March 1994, the plaintiff admitted receiving the sum of RM300,000 from Gan Kuan Leng as a consideration for the sale of the said property. The plaintiff did not make any denial of these allegations as advanced by the defendant.

Apart from the said property, the plaintiff also claims to be a director of two local companies. But the defendant in his affidavit (Encl. 18A) claims that these two companies do not have any substantial asset and both of them are inactive. The plaintiff did not rebut these allegations either. It is also not disputed that the plaintiff is now a bankrupt. In the above circumstances, I am of the view that the defendant's apprehension over the plaintiff's ability to meet any order as to costs that may be made by the Court is not without basis. However, the plaintiff's impecuniosity by itself is not a sufficient ground for me to make the order for security for costs. As said by the Bingham LJ in *Thune and Anor v. London Properties Ltd. & Ors.* [1990] 1 All ER 972 at p. 979:

> In approaching that question it cannot be too emphatically stated that impecuniosity of a personal plaintiff is never itself enough to confer on the Court a discretion to order security. It is not a ground in O. 23, r. 1(1), ... But I am for my part firmly of the opinion that it is a matter which the Court may, and in a proper case should consider in exercising a discretion when power to make an order is established.

I shall now turn to other matters that I consider are relevant for my consideration. Counsel for the plaintiff laid much emphasis on the fact that the plaintiff is a resident of Singapore, which is listed in the first Schedule of the Reciprocal Enforcement of Judgments Act 1958. And, coupled with that, in view of the close proximity of our two countries, he contended, the enforcement of judgment is relatively easy. I agree with the learned Counsel that ease of enforcement is a factor which should properly be taken into consideration. The learned Counsel referred me to the case of *Coldham v The Raub Australian Gold Mining Co. Ltd.* [1940] 9 MLJ (FMSR) 50 where the application for security for costs was refused by Poyser CJ on the ground that FMS judgment could quickly be enforced in Singapore. The learned CJ in his judgment stated:

> I would not hold as a matter of law that security for costs cannot be ordered against a plaintiff resident in any British territory where provision exists for the reciprocal enforcement of judgments with the Federated Malay States; but there is all the difference between enforcing an FMS judgment in the Colony and enforcing one in, say, Uganda. We have very close legal relations with the Colony, an FMS judgment could be quickly enforced there, and in regard to plaintiffs resident there, I would follow the decision in *Raeburn v Andrew.*

However, in *Ng Hui Lip & Anor. v. Chan Hwa Cheng & Ors.* [1958] 24 MLJ 57, Smith J took a some what different view, there he held that the enforcement of a Federation judgment in Singapore was not automatic and therefore, the mere fact that a plaintiff is resident in

Singapore is not a ground for the Court refusing to order security for costs under s. 369 of the Civil Procedure Code. The Court in *Ng Hui Lip's* case, granted the defendant's application for security for costs. With respect, I agree with the view expressed by Smith J therein.

In this case even though the plaintiff is resident in Singapore but until the date of hearing of this application, the plaintiff has not disclosed her Singapore address and nor has she offered any explanation for not doing so. This, in my opinion is a point which should weigh against the plaintiff. Next, I have been asked to consider the merits of the case. In evaluating the merits, the Court is always careful to avoid any attempt at a detailed investigation into the merits of the case. As stated by Sir Nicolas Browne-Wilkinson V-C in *Porzelack KG v. Porzelack (UK) Ltd.* [1987] 1 All ER 1074 at p. 1077:

> This is the second occasion recently on which I have had a major hearing on security for costs and in which the parties have sought to investigate in considerable detail the likelihood or otherwise of success in the action. I do not think that is a right course to adopt on an application for security for costs. The decision is necessarily made at an interlocutory stage on inadequate material and without any hearing of the evidence. A detailed examination of the possibilities of success or failure merely blows the case up into a large interlocutory hearing involving great expenditure of both money and time.
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> Undoubtedly, if it can clearly be demonstrated that the plaintiff is likely to succeed, in the sense that there is a very high probability of success, then that is a matter that can properly be weighed in the balance. Similarly, if it can be shown that there is a very high probability that the defendant will succeed, that is a matter that can be weighed. But for myself, I deplore the attempt to go into the merits of the case unless it can be clearly demonstrated one way or another that there is a high degree of probability of success or failure.

In the Singapore case of *Amar Hoseen Mohammed Revai v. Singapore Airlines Ltd.* [1995] 1 SLR 77, which was brought to my attention by learned Counsel for the plaintiff, there the learned JC considered at length the merits of the case and came to his finding that there is a strong possibility of the plaintiff succeeding. On that premise the learned JC disallowed the defendant's application. I am of the view that the Court should only embark into the investigation upon the merits in plain and obvious cases and not in cases where the issues involved are complex, as I find in this case. On the face of the pleadings and the affidavits before the Court I am of the view that the final outcome of this case is far from clear. Therefore, in the final analysis, the question of merits is not really crucial to the ultimate outcome of this application.

Conclusion

Having regard to all the circumstances obtaining in this case, which I have considered above, I am satisfied that this application should properly be allowed. I, therefore, order that plaintiff pay into Court the sum of RM15,000 towards security for costs before the next hearing date. Costs of this application shall be costs in the cause.